CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal (s) Involved:

C/20785, 20788 - 20794, 20797 – 20800, 20803, 21190/2018

[Arising out of Order-in-Appeal No.38-74/2017-18 dated 23/03/2018 passed by the Commissioner of Customs (Appeals), Kochi]

M/s Herbal Isolates Pvt Ltd.
Ajay Vihar, Near Hotel Avenue
Regent,
MG Road, Kochi – 682 016 .....*Appellant(s)*

Versus

Commissioner of Customs
Customs House, Willingdon
Island
Kochi – 682 009 ....*Respondent(s)*

Appearance:
Mr. Balagopal M, Advocate for appellant
Mr. Gopa Kumar (AR) for Respondent

Date of Hearing: 12/11/2018
Date of Decision: 30/11/2018

CORAM:

Hon'ble Mr S S Garg, Judicial Member
Hon'ble Mr CJ Mathew, Technical Member

Final Order No: _21830-21843_ / 2018

Per: C J Mathew

It was on the back of the shrivelled produce of this slender vine of the genus *Piper*, endemic to the highlands of the Malabar coast, that a worldwide empire was founded and ruled in the fifteenth

and sixteenth centuries by a small kingdom of the Iberian peninsula. The voyage of that intrepid Portuguese navigator, Vasco da Gama, in search of the fabled sea route to the Indies round the Cape of Good Hope broke the monopoly of Venice and of the Arabs in the overland spice trade to give to his country the wherewithal for territorial expansion; more particularly, *Piper nigrum*, the 'black pepper' or 'peppercorn' of the European languages traceable to the Sanskrit '*pippali'*, the 'long pepper' or *Piper longum*, to which it is akin but mistakenly confused with. The serendipitous attempt by another great navigator of the time from Genoa, Christopher Columbus, to make landfall in the Indies by the western passage, obtained for the other Iberian kingdom, the Spain of later days, its empire spread over the Americas and the Pacific and, from the Columbian Exchange, the other '*peppers'* or *chilli* of the genus *Capsicum*. The conflict of those empires for control of the Atlantic Ocean were settled by the Treaty of Tordesillas (1494) and by the Treaty of Zaragoza (1529) for that over the Pacific to bifurcate the globe between these two maritime powers. Another two centuries was to elapse before the confusion of the 'peppers' was resolved in 1735 by the Linnaean taxonomy. It would, however, appear from the rival contentions before us in this dispute over order-in-appeal no.38-74/2017-2018 dated 23rd March 2018 of Commissioner of Customs (Appeals), Kochi, that the pique over the piquancy, so to speak, is far from over; the battle, no less fierce,

continues in the courtroom. This narrative is not mere pedantic exhibitionism but, according to us, provides the framework for its resolution as it unfolds below.

2. The appellant, M/s Herbal Isolates Pvt Ltd, described its import, against various bills of entry listed in the impugned order, as 'green pepper' under heading no. 0709 99 10 of the First Schedule to the Customs Tariff Act, 1975 in the chapter titled 'Other Vegetables, Fresh or Chilled' which, not being acceptable to the assessing authority, was re-classified under heading no. 0904 11 90 of the First Schedule to the Customs Tariff Act, 1975 as 'other' 'pepper (genus *Piper*), neither crushed nor ground' in the chapter titled 'Coffee, Tea, Mate and Spices.' Doubtlessly, the privilege attached to 'advanced authorization' against which the imports were effected for, what is undisputably, conversion into products for export should, ultimately, render this exercise to have only academic consequence. The neutralization of taxes and duties, undeniable as they are, will not, according to Learned Authorized Representative, immunize the appellant from the penal consequences of failure to fulfill the obligation to make correct declaration or enable the customs authorities to abdicate their responsibility for determination of the appropriate classification. It is against this backdrop that the arguments were presented by both sides.

3. Learned Counsel for appellant submits that ‘green pepper’, in bunch, are imported from Sri Lanka in the form in which they were plucked from the vine to be subject to processing, either by brining or by dehydration, before export owing to general preference among Indian cultivators of this cash crop for the higher prices obtainable from sale of ‘peppercorn’ in the domestic market. Drawing attention to the insertion of a specific entry for ‘green pepper’ in the First Schedule to the Customs Tariff Act, 1975, unique to India, in addition to the entry for the processed product in the parent Harmonised Commodity Description and Coding System, and, inevitably, precluding classification in the latter by the mandate of ‘most specific description’ in rule 3 of the General Rules for the Interpretation of the Harmonised System, the reliance by the lower authorities on an erroneous interpretation of the ‘inclusive’ definition in note 2 of chapter 7 of First Schedule to Customs Tariff Act, 1975 to exclude coverage by emphasizing on the omission of this genus therein has had the consequence of perverse classification under a residual, and amorphous, description. According to him, the progressive structuring of the Tariff impliedly disallows the placement of ‘inputs’ under the very last residuary description when ‘output’, ‘green pepper in brine‘, as admitted to by Revenue, precedes this. Drawing attention to the significance of ‘-‘, ‘—‘, ‘---‘, ‘----‘ in General Explanatory Note 1 to

the General Rules for Interpretation of the Schedule, the mutual exclusion of ‘fruits of the genus *Capsicum* or genus *Pimenta’* designated with ‘-‘ in heading 0709 60 and ‘green pepper’ designated with ‘----' under ‘other’ against ‘---’ within ‘other vegetables, fresh or chilled’ designated with ‘-‘ corresponding to the declared classification is consistent with the intent to distinguish raw produce of the specified genus as well as that of ‘genus *Piper’* or ‘vegetable’ from the dried version or ‘spices’ in a later chapter. He further claims that the earlier imports at Kochi, and other imports elsewhere in the country, under chapter 7 is the considered wisdom of the assessing authorities that is now attempted, perversely, to be derailed. It is also his contention that the Tribunal, in *Collector of Customs, Cochin v. Mermaid Foods [1994 (71) ELT 637 (Tribunal)]*, has decided in their favour by holding that cess leviable on ‘pepper’ under section 3 of the Spices Board Act, 1986 is not applicable to ‘green pepper in brine’ let alone on ‘green pepper’ indicating the lack of legislative sanction for classification as ‘spice’ and that cess leviable under Agricultural and Processed Food Products Export Development Authority Act, 1985 would take it out of the categorization as ‘spice.’

4. According to Learned Authorized Representative, the lower authorities were correct in revising the classification inasmuch as chapter 9 of the First Schedule to the Customs Tariff Act, 1975 is

exclusively for spices and coverage under chapter 7 is intended only for vegetables, and that, though peppers may be considered to be ‘vegetables’, ‘green pepper’ plucked from the vine of a spice plant stands excluded as per the notes to chapter 7. In the context of specific description and specific coverage in chapter 9 of First Schedule to the Customs Tariff Act, 1975 consequent on absence from the inclusions in note 2 of chapter 7, the classification claimed by the appellant would not be appropriate. He further contends that the definition of ‘spices’ as ‘a group of vegetable, rich in essential oils and aromatic principles, and which on account of their characteristic taste, are used as condiments’, substantially describes the impugned imports and the presence of essential oils and aromatic principles in the green form is unquestioned with the dried form merely concentrating them.

5. Having heard the rival submissions, we are yet to appreciate the rationale for initiation of proceedings in the context of the entire import consignments having been subjected to processing for export. Under these circumstances, any alteration in duty arising from re-classification can only be academic and even if the advance authorization were not to be valid, the export consignments would be entitled to neutralization of all the duties that have gone into its production. Nevertheless, this aspect not having been pressed or

agitated before us, we are compelled to delve into the merits of the issue.

6. There can be no dispute on the contention of Learned Counsel that goods are required to be classified under the most specific heading. It must be noted that the tariff item arrived at by customs authorities is a residuary while that claimed by appellant brooks no room for ambiguity. The Hon'ble Supreme Court in that landmark decision in *Dunlop India Ltd & Madras Rubber Factory Ltd v. Union of India and Others [1983 (13) ELT 1566 (SC)]* has held that

> *'37. It is good fiscal policy not to put people in doubt and quandary about their liability to duty, when a particular product… known to trade and commerce in this country and abroad is imported, it would have been better if the article is eo nomine, put under a proper classification to avoid controversy over the residuary clause..... When an article has, by all standards, a reasonable claim to be classified under an enumerated item in the Tariff Schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause. The question of*

competition between two rival classifications well, however, stand on a different footing.'

consistent with earlier judgement in *Ramavatar Budhaiprasad v. Assistant Sales Tax Officer [(1962) 1 SCR 279]* that referred with approval to the decision of the Exchequer Court in *King v. Planters and Chocolate Company Limited*, in *Commissioner of Sales Tax, Madhya Pradesh, Indore v. M/s Jaswant Singh Charan Singh [AIR 1967 SC 1454]* and in *South Bihar Sugar Mills Ltd, etc. v. Union of India [1978 ELT 336]*. Though this should set at rest all controversy on the appropriateness of the tariff item claimed by appellant, the iota of doubt marshalled by Learned Authorised Representative that the 'green pepper' in chapter 7 of the First Schedule to Customs Tariff Act, 1975 is not the apt description of genus Piper but intended to levy duty on other genus of culinary use as vegetable must be scrutinised.

7. According to Learned Authorised Representative, the inclusions effected by note in chapter 7 of First Schedule to Customs Tariff Act, 1975 was intended merely to cover 'peppers' of the 'Colombian Exchange' variety that are used as vegetables and 'green peppers' in that chapter cannot be construed as intended for any other plant produce. This trajectory of reasoning appears to flow from the understanding of the customs authorities that 'pepper' of the Indies variety is spice distinguishable from the other peppers that are

vegetables. It is abundantly clear from rule 1 of The General Rules for the Interpretation of Import Tariff that titles of chapters does not determine classification which necessarily commences with headings. Therefore, the notion that all products of the 'pepper vine' should necessarily be placed in the chapter pertaining to 'spice' is fallacious. Spice is a traded commodity, and has been for centuries, with the implication that it must necessarily be in a desiccated form for it to last and to preserve the characteristic that is so tempting to the human race. Spice is, therefore, not the produce of a plant but the product of processing of such produce. Here too, we may draw upon the wisdom of the decision of the Exchequer Court *supra* that influenced the Hon'ble Supreme Court articulated thus

> *'32. ……*
>
> *Now the statute affects nearly everyone, the producer or manufacturer, importer, wholesaler and retailer, and finally the consumer who, in the last analysis, pays the tax. Parliament would not suppose in an Act of this character that manufacturers, producers, importers, consumers, and others who would be affected by the Act, would be botanists……. the Legislature does not suppose our merchants to be naturalists, or geologists, or botanists.'*

The consistent view of the Hon'ble Supreme Court is that the common understanding of a description is the best yardstick for classification. While 'peppers' may refer to the 'Colombian Exchange' variety in household and culinary usage of the Occident, in our country the derivative of the Latin expressions differentiates these from 'pepper' that was traded in Europe by Venetians, Arabs and the Portuguese in that order; well and truly, 'pepper' is that which is picked from the vine of the genus *Piper*. The submission on behalf of Revenue does not find favour.

8. Having thus isolated the legislative intent, a perusal of the enumerated tariff items under 090411, the last of which has been crystalised as the most appropriate by the lower authorities, confirms the supposition that these have been clubbed together for its utility as 'spice' in its processed form. In that scheme, the source should not find a place at the tail end. As pointed out by Learned Counsel, the brined/dehydrated product emanating from the processing of 'green pepper' picked from the vine cannot, by any stretch, be accorded a place preceding that of the latter. It would, therefore, appear that, in the form in which the goods were imported, placement within this heading is inappropriate and the appropriateness of the claimed classification may now be turned to.

9. The inclusion in note 2, with corresponding exclusion in note 4, in chapter 7 of the First Schedule to Customs Tariff Act, 1975 is a deliberate inclusion to eliminate any doubts that may be entertained of the headings appropriate for classification of genus *Capsicum* and genus *Pimenta*. The absence of a specific heading for these varieties enlightens us as to the intent. By this specific inclusion of fruits, i.e., whose seeds are capable of germination, not generally known in the country as 'pepper', there would be no attempt to classify them in the heading considered appropriate to that class of plants. There was, therefore, no need to bring the other class in the dichotomous distribution of producing plants specifically for coverage in this chapter. Hence, the misconception that 'green pepper' is a spice and that, until it is processed, is not a vegetable that appears to have been the basis for initiating proceedings against the appellant should no longer stand in the way of endorsing the declaration of the appellant in the bills of entry.

10. The usage of the expression 'peppers' in the media channels that cater to the privileged few cannot be appropriated as the *lingua franca* of the trade and that of consumers across centuries till the present. Therefore, in accordance with the principles enunciated by the Hon'ble Supreme Court *supra*, we find that the impugned orders

lack the mantle of logic and the sanctity of law. These are, accordingly, set aside and the appeals allowed with consequential relief, to the extent applicable.

(*Order was pronounced in Open Court on **30/11/2018***.)

(S S Garg)
Judicial Member

(C J Mathew)
Technical Member

rv...